

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

R. D. HUME, claimant of the schooner
Berwick, her tackle, apparel, furniture
and cargo,

Appellant.

vs.

J. D. SPRECKELS & BROS. CO.,

Appellee.

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Appellant's Opening Brief.

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No. 681.

APPELLANT'S OPENING BRIEF.

Statement of the case.

R. D. Hume, the plaintiff in error, is a resident of Curry County, Oregon. He has an office in San Francisco. Appellee is a California corporation, and is the owner of the tugboat called the Escort, trafficking around and over the Columbia River bar.

Appellant is the owner of the 95 ton schooner Berwick. On October 4th, 1898, about 12 o'clock noon, the Berwick left the Nehalem River, Oregon, bound for

the port of San Francisco. The Berwick before starting on her passage was staunch and tight in every way, and her rigging, masts and general apparel were in good order. She had a cargo of one hundred and thirty-eight thousand (138,000) feet of pine, well stowed. She left the Nehalem River in tow of the tug Maggie. At the time the current in the ocean was northward, and the wind from the south. In leaving the Nehalem River, the Berwick struck on its south spit. The Maggie returned to the Nehalem River, and as the Berwick was taking water, its captain, on account of the current and the wind, concluded to run for the Columbia River, about thirty-five (35) miles distant, instead of continuing on his way to San Francisco. About seven o'clock in the morning of the 5th day of October, 1898, the Berwick arrived off the Columbia River. The day was calm, and the schooner was obliged to lie outside waiting for wind. About four o'clock in the afternoon a breeze sprang up and the Berwick started to sail. About 5:30 o'clock in the afternoon of October 5th, 1898, the steam schooner Fulton was spoken. The Fulton was on her way south from Gray's Harbor to San Francisco. The captain of the Berwick requested the Captain of the Fulton to report to the owner of the Berwick in San Francisco the fact that his vessel was leaking, and that he was on his way to Astoria. The captain of the Fulton criticised the captain of the Berwick for stopping him, and started on his way to San Francisco. After a short time his

anger subsided, he returned to the Berwick and discussed the rate of compensation for a tow to Astoria. The two captains remained on their respective vessels. The captain of the Berwick offered one hundred dollars (\$100.00), the captain of the Fulton demanded two hundred and fifty dollars (\$250.00). Finally the captain of the Fulton said that he would tow the Berwick to Astoria, and leave the amount of compensation to be fixed by the owners of the respective vessels. This proposition was accepted, and the hawser of the Fulton was passed to the Berwick. The weather was fine, the atmosphere was clear, and as night advanced the moon shone brightly. The Fulton and her tow arrived at the mouth of the Columbia about eight o'clock P. M. of October 5th, 1898. The captain of the Fulton was of the impression that the underwriters had some restriction against entering the Columbia River at night time, and also that there was a law prohibiting such entry. He, therefore, cruised around the mouth of the river waiting for day break. About 4:30 o'clock in the morning of October 6th, 1898, the tug Escort appeared. The captain of the Escort visited the captain of the Fulton, in the latter's cabin, and agreed on terms. The Escort paid the Fulton one hundred dollars for the tow, and then ordered the Berwick to release the hawser of the Fulton, and take the hawser of the Escort. The captain of the Escort did not consult the captain of the Berwick, and had no communication or conversation

with him until he issued the command to take his hawser. The Berwick refused to take the hawser of the Escort, and in place of doing so the captain of the Berwick commanded his mate to inquire of the captain of the Fulton whether or not the Berwick should take the Escort's hawser. The Fulton's reply was to take the Escort's hawser; that the Escort would complete the tow to Astoria. The Berwick thereupon took the Escort's hawser, and was towed to Astoria, arriving there about eight o'clock in the morning of October 6th, 1898. The claimant offered to pay for the services in accordance with the agreement with the Fulton.

On October 20th, 1898, a libel was filed against the Berwick. The vessel was arrested on October 21st, 1898. On October 22nd, 1898, a claim was filed, and the Berwick was released.

The depositions of the captain, the mate and the steward of the Berwick, and of the captain of the Fulton, as well as that of the claimant, were taken in San Francisco in March, 1899, and were returned by the Commissioner in June, 1899. The cause was tried in November, 1900, and a decree entered in favor of the libelant for five hundred dollars (\$500.00) and costs.

From that decree the claimant has appealed to this Court, and contends that the testimony shows that the service rendered by the Escort was not a salvage service, but was merely a towage service, and that the compen

sation should have been fixed at the reasonable value of towage service on the Columbia River bar, taken in connection with the contract made by the captains of the Berwick and the Fulton; that the compensation as fixed is excessive, and that no allowance or compensation should have been awarded or decreed to the Escort, but the Escort should have been compelled to look to the Fulton for its compensation; that the Escort was merely the agent of the Fulton in carrying out its contract; that the Berwick was not in danger immediate or remote; she was leaking some, but was loaded with lumber, and had sailed without difficulty from Tillamook to the mouth of the Columbia River, and would have gone in unattended to Astoria. When spoken by the Fulton she did not ask for assistance, and did not need any. She wanted only to be reported in San Francisco. She contracted with the Fulton to tow her in to Astoria for a compensation to be fixed by the respective owners of the vessels, which compensation was not to be less than \$100.00, nor more than \$250.00. This contract was assigned by the Fulton to the Escort, the Escort completed the performance of the contract, and has no claim for salvage service, and none for towage service as against the Berwick.

Specifications of Error.

I.

The Court erred in holding that the services of the Escort were salvage services.

II.

The Court erred in not holding that the services of the Escort were merely towage services.

III.

The Court erred in not holding that the Escort was bound by the contract between the Berwick and the Fulton.

IV.

The Court erred in not holding that there was an agreement for towage to be not less than one hundred dollars (\$100.00), nor more than two hundred and fifty dollars (\$250.00).

V.

The Court erred in not holding that the Escort was the agent of the Fulton in towing the Berwick to Astoria.

VI.

The Court erred in allowing the libelant more than reasonable compensation.

VII.

The Court erred in stating as a finding of fact that "That on the 6th day of October, 1898, said tugboat was moored at a wharf in the port of Astoria, in this District, and about midnight the master of the tug, who was then in bed at his dwelling-house in Astoria aforesaid, was awakened by a telephone call, and noti-

fied that rockets and signals of distress were being fired out at sea, and thereupon said master got his crew together and got up steam on the said tugboat and proceeded out to sea to ascertain what was wanted. At a distance of about ten miles off the Columbia river, being about thirty miles from Astoria, he found the respondent loaded with about 138,000 feet of lumber, leaking badly, but in tow of the steam schooner "Fulton".

VIII.

The Court erred in stating as a finding of fact that "said respondent, the schooner 'Berwick' on the 5th day of October, 1898, in tow of a tug, had crossed out from the Nehalem river, loaded as aforesaid, and bound for San Francisco, California. In passing out, said schooner struck heavily on the bar at the mouth of the Nehalem river and sprung a leak. The leak was not discovered until the tug had let go of the schooner and started back into the Nehalem river, when a signal of distress was hoisted, but it failed to attract the attention of the tug, but did attract the attention of the steam schooner Fulton, then on its way to San Francisco."

"The Fulton spoke to the schooner and the master of the schooner asked to be towed into the Columbia river, which the master of the Fulton offered to do for \$250, but the master of the Berwick declined and offered \$100 for the service. The master of the Fulton declined that offer, but proposed to tow the Berwick into the Colum-

bia river and leave the price to be settled by the owners of the Fulton and the Berwick, and that proposition was accepted and the Fulton took hold of the Berwick and started in with her, arriving at the mouth of the Columbia after dark, but it was very clear, the moon was shining brightly and objects could be plainly seen on the water. The Fulton started in with her tow, but the Berwick was well filled with water and was very low in the water and towed badly and the Fulton did not have sufficient power to handle her properly, and she drifted out of the channel, and thereupon the master of the Fulton fearing the tow would go ashore, turned and went out to sea and anchored, where they were found by the tug Escort, as aforesaid."

IX.

The Court erred in stating as a finding of fact that "The Escort having arrived as aforesaid, the master of the Fulton proposed that he should be paid \$100 for the services thus far of the Fulton, and that the Escort should tow the Berwick into Astoria, and the master of the Escort paid the Fulton \$100 and took the Berwick in tow and towed her safely to a dock in Astoria, where her cargo was discharged and her damages repaired."

X.

The Court erred in stating as a finding of fact "That said schooner Berwick was of the value of \$5,000."

XI.

The Court erred in stating as finding of fact that

“The Berwick was so badly injured that she could not have lived at sea, nor could she have gotten into port without the aid of the Escort, and the services performed by the Escort were salvage services.”

XII.

The Court erred in stating as finding of fact “That the sum of five hundred dollars is a reasonable sum to be allowed for the services rendered as aforesaid by the said tug Escort to said schooner Berwick, and libelant is entitled to a decree for that amount against such schooner, her tackle, furniture, etc.”

XIII.

The Court erred in stating as a finding of fact that “This cause having come on to be heard on the pleadings and proofs produced by the respective parties, and having been argued by the respective advocates, and it appearing to the Court that the libelant is entitled to recover for the services alleged in the libel the sum of five hundred dollars, now on motion of C. W. Fulton, proctor for the libelant, it is ordered, adjudged and decreed that the libelant above named recover against the respondent above named the sum of five hundred dollars and costs, taxed at the sum of \$80.50 making in all the sum of \$580.50, for which sum said schooner, her tackle, furniture and apparel, are hereby condemned.

“It is further ordered, adjudged and decreed that unless this decree be satisfied or proceedings thereon be stayed on appeal within twenty days from the date

of this decree, and in the manner prescribed by the rules and practices of this Court, the stipulators for costs and value on the part of said vessel cause the engagements of the stipulation to be performed, or show cause within the time prescribed by law why execution should not issue against their goods, chattels and lands to satisfy this decree.”

XIV.

The Court erred in not dismissing said libel and in not awarding claimant judgment for costs.

Points and Authorities.

I.

A salvage contract, unless inequitable, is enforceable by the salvor. He should be bound, as well as benefited, by such a contract.

The C. & C. Brooks, 17 Fed. 548;

The Thornley, 98 Fed. 735;

The Tornado, 109 U. S. 110.

II.

This Court can review the findings of fact as well as the questions of law.

The Brandywine, 87 Fed. 652.

III.

The Escort became merely a substitute for the Fulton in towing the Berwick into Astoria, and in performing the duty that belonged to the Fulton.

The J. W. Husted, 36 Fed. 604.

IV.

There can be no salvage, unless the vessel assisted was in distress and peril.

The Viola, 55 Fed. 832;

The Emily B. Souder, 15 Blatch. 185.

V.

The Fulton being bound by the towage contract to take the Berwick in to Astoria, the Berwick was not in peril.

The Wasp, 34 Fed. 222.

VI.

The contract with the Fulton is the limit of liability.

Elphicke vs. White Line Towing Co., 106 Fed. 945.

VII.

The services were only towage services.

The Catalina, 105 Fed. 633;

The J. C. Pfluger, 109 Fed. 93.

VIII.

The allowance is excessive.

The Bay of Naples, 48 Fed. 737.

The Monticello, 81 Fed. 211;

The Alice Blanchard, 106 Fed. 238;

The Kaiser Wilhelm Der Grosse, 106 Fed. 963;

The Santa Ana, 107 Fed. 527;

IX.

If the Fulton had left the Berwick instead of turn-

ing her over to the Escort, the Fulton would not be entitled to any compensation.

The Algitha, 17 Fed. 551.

X.

The burden of proof is on the libelant.

The Jarlen, 43 Fed. 176.

Argument.

The burden of proof being on the libelant (*The Jarlen*, 43 Fed. 176), and this Court having the power to review the findings of fact (*The Brandywine*, 87 Fed. 652), we will consider the evidence, which, we think, is strongly in favor of the claimant.

The Berwick was not in peril, danger or distress, either present or imminent, or immediate or remote. She could have reached Astoria, unaided, without any difficulty other than the temporary discomfort to her crew from the work of manning her pumps (p. 69, 70, 35 and 41). By the aid of a tow she could the sooner reach Astoria, her voyage would be thereby expedited, and her owner more quickly notified of her location.

The claimant took the deposition of Captain McIntyre of the Fulton, in March, 1899. As the cause was not tried until November, 1900, the libelant had some nineteen months in which to consider claimant's testimony before producing his own. We call attention to this interval of time because the libelant was so careful in the matter that at the time of the taking of claim.

ant's depositions he had all of the witnesses excluded, except the one under examination (p. 28).

Captain McIntyre testified as follows (pages 71 to 74):

“Q. State the circumstances under which you picked
“ up the ‘Berwick’.

“A. As near as I can remember, she was about
“ twenty miles off the coast, and she was under sail
“ and in working order, with a flag set on the main—it
“ was not set as a signal of distress, or anything like
“ that, but just to attract attention. I changed my
“ course and ran for her. When I got within hailing
“ distance, I spoke to him, and asked him if he wanted
“ any assistance. He said, ‘I would like to be reported
“ ‘ to my owners at San Francisco.’ That made me a
“ little mad, to think I had run out of my way eight
“ or ten miles, and I turned around and started
“ on my course again, and the mate spoke up
“ and said, ‘It is pretty hard to leave him there, with-
“ ‘ out finding out what he wants. He may want some-
“ ‘ thing.’ So I said yes, and turned around and went up
“ to him and asked him what was the matter. He
“ said that the tugboat had pulled him on the spit at
“ Nehalem river coming out, and that he was making
“ some water; that the weather had been fine, and he
“ was afraid if he came down the coast and got into
“ heavy weather that she might open up on him. He
“ asked me then if I would tow him into Astoria. I
“ told him I would for \$250. He said that he could not

“ afford to give that much money, that the ship could
“ go to San Francisco, and if I would take him in for
“ \$100, he thought it was better to go in there and see
“ what damage was done, and then go on. I told him
“ I would not do that, but that I would take him in and
“ leave it with the owners to settle. He said, ‘Very
“ well’, and I gave him a hawser. I towed him in over
“ the bar, and it was a nice moonlight night, very
“ smooth. When I got in to the bar, the whistling
“ buoy was gone, and I went on in further to No. 0
“ starboard buoy, and started to run for the No. 2. In-
“ stead of making the No. 2, I made the No. 1 buoy on
“ the port side. So I knew then that with a tow I could
“ not run my courses, the course I had been running
“ before that, and that it was better to take no chances.
“ So I turned around and headed her off to the south-
“ west, and put her on a slow bell, and went and laid
“ down for a rest. While I was lying down, the tug
“ came on—I think it was the ‘Escort No. 2’—and the
“ captain of the ‘Escort’ spoke to the second mate of
“ the ‘Fulton’, who had the bridge, and he told him to
“ let go his hawser, that he would take the tow. The
“ second mate says, ‘Well, I guess you had better speak
“ to the captain about that.’ So he asked where the
“ captain was. The second mate said he was down be-
“ low, and he came down and called me out, and then
“ I went up on the bridge, and we, the captain of the
“ ‘Escort’ and I, talked the matter over a little while,
“ and I told him no, I could take her in when

“ daylight broke; that as I had lost about eight hours’
 “ time, I thought I would lose a little more. So then
 “ I talked to the mate—the mate came on at four o’clock,
 “ and we talked the matter over and came to the con-
 “ clusion that if we let him tow her in we could make
 “ this place in the morning, and that would save us a
 “ day in discharging.

“ Q. Make San Francisco in the morning, did you
 “ mean?

“ A. Yes, sir, make San Francisco in the morning
 “ instead of at night, and that would give us a day’s
 “ work, by letting the tug tow her in. So we got to
 “ talking, and he asked me if I had a cup of coffee on
 “ board.

“ Q. Who asked you that?

“ A. The captain of the ‘Escort’. So he came
 “ aboard and we went down and had a cup of coffee.
 “ Down there he asked me for the tow.

“ Q. That is, the captain of the ‘Escort’ did?

“ A. Yes, sir. He further asked me if we had been
 “ burning any lights. He said it had been reported at
 “ Astoria that there had been blue lights burning, and
 “ one thing and another. We laughed over that
 “ matter, for he came up and saw how things were
 “ situated, my having hold of the boat, and so on. We
 “ wondered how such a report could get around. I said
 “ it must have been because we had turned around
 “ several times on the bar, and our green and red
 “ lights would probably flash as the vessel turned

“ around. However, he said he didn’t like to come up
 “ for nothing, and he would have to go back home, and
 “ they would have the laugh on him, and he, (I) says, ‘I
 “ ‘will tell you what I’ll do’, I said, ‘I expect to get
 “ ‘closer to \$250 than to \$100 for the tow after she is
 “ ‘landed in Astoria. If you are willing to take it on
 “ ‘those conditions and give me \$100, you can have
 “ ‘her.’ He hemmed and hawed a little while, and he
 “ says, ‘Well, rather than go back empty, I will take
 “ ‘her.’ So he went up into the purser’s room with
 “ me, and the purser made out a check, and the captain
 “ of the tugboat signed it—a check on Spreckels.

“ Q. For what amount was that check?

“ A. \$100.

“ Q. What occurred then? Did he do anything?

“ A. He went aboard his vessel, and bid me ‘Good
 “ morning’, and went back to the ‘Berwick’ and asked
 “ the ‘Berwick’ to let go the line. The captain of the
 “ ‘Berwick’ sent his mate forward, and he said, ‘Will I
 “ ‘let go of the hawser, captain?’ Says I, ‘Yes. He
 “ ‘will tow you in, and everything will be all right.’
 “ That is all. After that I proceeded on my way to
 “ San Francisco.”

On cross examination (p. 78), Captain McIntyre testified:

“ Q. So there was considerable danger in going in
 “ there with that tow, and such danger that you did
 “ not care to take the risk at that time?

“ A. I did not care to go in, not that there was any

“ danger, but then, there is a certain restraint that a
 “ man has on himself, so that he doesn't like to do
 “ those things.

“ Q. To take any chances?

“ A. And I believe there is a law prohibiting us from
 “ entering there at night, anyway. I believe that the
 “ underwriters have restrictions on that.”

On re-direct examination this witness testified
 (p. 82):

“ Q. Was the 'Berwick' in any danger during that
 “ time, the time that you had her in tow, or before the
 “ time when you picked her up?

“ A. No, sir, I don't think she was. Not that I
 “ saw.

“ Q. Mr. Frank has asked you with reference to
 “ your reason for not taking the 'Berwick' in in the
 “ night time, whether there was not some danger.
 “ Would there have been any danger in taking her in
 “ in the daytime?

“ A. None whatever.

“ Q. So you could have taken her in the same
 “ morning that the 'Escort' took her in?

“ A. I would have taken her right in, yes, sir.

“ Q. I gather from what you say that your only
 “ object in letting her go was to save the eight hours'
 “ time in your arrival at San Francisco?

“ A. Yes, sir, that is all; just to get down here in
 “ the morning instead of at night.”

The testimony of the captain, the mate and the

steward of the *Berwick* substantiate the testimony of Captain McIntyre (p. 35, 41, 55, 69, 70).

There is no conflict with the disinterested testimony of the captain of the *Fulton*, supported as it is by the captain, mate and steward of the *Berwick*, unless the statement of Mr. Randell, who did not see the *Berwick* until she reached the wharf at Astoria (p. 22), "The schooner was in such a condition that she could not possibly have lived at sea, nor could she have made any port without the assistance of a tugboat", and the statement of Captain Howe (p. 24), "She was leaking very badly, and could not possibly have lived but a very short time at sea, nor could she have sailed in to the Columbia river, as the wind was blowing off shore", can be forced into a seeming contradiction of Captain McIntyre's testimony.

The *Berwick* at the time she took the hawser of the *Escort* was in the tow of the *Fulton*; she could have made the port of Astoria on the morning of October 6th, 1898, under the tow of the *Fulton* with the same degree of safety, and the same facility as under the tow of the *Escort*. She was not required to sail to Astoria, as she had the services of the *Fulton* to tow her in, and if she could live long enough for the *Escort* to tow her to Astoria, she would have lived at sea long enough for the *Fulton* to have towed her in. Besides, on the evening of October 5th, 1898, when the *Fulton* took the *Berwick* in tow, there was a "very fine breeze at the time" (p. 41), and the *Berwick* would undoubtedly

have made Astoria under her own sail, had not the Fulton been spoken. Captain Anderson, of the Berwick, did not ask for assistance. His sole request was to be reported in San Francisco, but when Captain McIntyre offered to tow the Berwick to Astoria, Anderson considered, under the circumstances, it was good business judgment to accept, provided the charge was reasonable. He refused to pay \$250 because he thought that amount was extortionate (pp. 40-41), and an agreement was made for an amount between \$100 and \$250 to be fixed by the owners of the respective vessels.

This contract may not have been phrased in the precise and formal language of a legal document. A contract made on the high seas, where vessels are in constant motion from the action of wind and wave, and communication is by the use of megaphones, cannot be expected to have the formal characteristics of an agreement made on shore, or between two men on the same vessel. Such a contract would naturally be abbreviated, and the parties would assume what was readily understood and implied from the situation and language, that the minimum amount for the services was to be \$100 and the maximum amount \$250, and that instead of bargaining under the difficulty of the situation of the two boats, the precise amount between such minimum and maximum amount should be fixed by their respective owners.

There is no shadow of a doubt as to the making of

this contract, and that the Fulton was bound thereby. The amount paid by the Escort to the Fulton for the tow emphasizes and supports the testimony of Captain McIntyre, that he informed Captain Howe of the contract. Captain Howe (p. 24) denies that Captain McIntyre informed him of the contract, but it is singular that Howe inquired of McIntyre about a contract between the Fulton and the Berwick, but neglected to make such inquiry of the Berwick. If Howe was so cautious as to inquire of McIntyre whether he had any contract to tow in the Berwick, it is reasonable to assume that he would have verified the denial of such contract by McIntyre, or would have discussed terms with Captain Anderson. McIntyre relates with circumstantiality of detail the conversation between himself and Howe, and the fact that Howe paid McIntyre \$100 and neglected entirely to make any inquiries of Captain Anderson, demonstrates that Howe knew of the existence of the contract between the Fulton and the Berwick at the time he ordered the Berwick to take the Escort's hawser. If he did not, the refusal of the Berwick to take the Escort's hawser, until after inquiry of and command therefor from the Fulton, would have put him on inquiry, the natural thought that would arise in his mind, considering his experience and his carefulness in inquiring of McIntyre as to the existence of a contract, is, why does the Berwick refuse to release the hawser of the Fulton and take the hawser of the Escort, unless there is a contract entered into between

the Fulton and the Berwick, which occasions the refusal. But whether or not Howe was informed of the contract, it is binding on the Escort as the agent for the Fulton. The agreement for the release of the hawser of the Fulton and the taking of the hawser of the Escort, was made between McIntyre and Howe. Anderson was not a party to it; he was not consulted, and, sailor-like, he obeyed the order, after inquiry of the Fulton, because he deemed it his duty to obey the instruction of the towing vessel. It would have been a simple matter for Howe to have inquired of Anderson about the existence of a contract between the Fulton and the Berwick, and his neglect to do so should not place him in a stronger position than if he had followed his plain duty, and most assuredly should not have terminated the contract relation of the Fulton and the Berwick, and caused the Berwick to be mulct in a large sum of money for salvage charges and costs. There can be no doubt that Anderson would have refused the hawser of the Escort had he thought there was any liability or responsibility in accepting it, in excess of the liability assumed under the contract between him and Captain McIntyre. "In view of these facts, if the master of the Monterey (Escort) expected to claim salvage compensation, he should have said so at the time, in order that the Souder (Berwick) might determine whether she would accept his services on that condition. There is no pretence of any such notice * * * and, in my opinion, no such service was in fact rendered.

Towage only was wanted, and that was the only service rendered or accepted." (*The Emily B. Souder*, 15 Blatch. 185.)

Conceding, for the purposes of the argument, that the *Escort* was not bound by the contract between the *Fulton* and the *Berwick*, the compensation awarded is excessive.

The libelant is engaged in the business of towage. It maintains two tugs, the *Escort*, and the *Relief*, for such purposes. The regular price of towing lumber ships over the Columbia river bar when they are loaded is fifty cents per thousand feet of lumber on board (p. 24). The towage charge or compensation, therefore, would amount to the sum of \$69.00. The libelant was a volunteer, pursuing its ordinary and regular business, soliciting for towage. It assumed no risk, and compensation for its services did not depend on the successful towage of the *Berwick* to Astoria. The *Escort's* crew did not receive any extra compensation. It was a simple matter of towage. It would have been ample compensation had it been awarded the sum of \$100.

On this point Captain McIntyre testified (p. 75):

" Q. Was anything discussed between you with
" reference to what it was worth to take the '*Ber-*
" *wick*' into Astoria?

" A. Yes, sir.

" Q. What was stated between you and the captain
" of the '*Escort No. 2*' in that regard?

“ A. What was said about it? Why, we said that
“ we thought that \$250 was a big amount of money
“ for the job.

“ Q. Who said that?

“ A. Well, it was stated between us when we talked
“ the thing over.

“ Q. And you and the captain of the ‘Escort No.
“ 2” agreed that \$250 was a large sum of money
“ to pay for towing the ‘Berwick’ into Astoria?

“ A. We thought it very good pay.

“ Q. For towing her from where? From where you
“ first picked up the ‘Berwick’, or from where you
“ were then?

“ A. From where I first picked her up.

“ Q. You did not segregate what the tow was
“ worth from the place where you picked her up to
“ where you were when the ‘Escort No. 2’ met you?

“ A. Yes, sir, I did. I said that I thought I was
“ amply paid to get \$100 for eight hours’ work. I
“ said ‘if the ship can make that every day in the
“ ‘week, she will be doing pretty well.’

“ Q. Did you tell the captain of the ‘Escort No. 2’
“ that if he received \$250 for the tow, and paid you out
“ of that the sum of \$100 for what services you had ren-
“ dered, that he would be well paid for his taking the
“ vessel in to Astoria?

“ A. Yes, sir. He said he thought if he could get
“ as much out of it as I did, it would pay him for com-

“ing out there.”

(See also pages 79, 80 and 81.)

The trial Court inferentially found that the Escort proceeded to sea because of the notification that rockets and signals of distress were being fired (Finding 2, p 16).

The testimony is conclusive that no rockets were fired and no signals of distress were given. Captain McIntyre testified (p. 77):

“ Q. Did you have any lights burning that night
“ for the purpose of attracting attention?

“ A. No, sir.

“ Q. Just your ordinary ship lights?

“ A. Just the ordinary ship lights.”

Captain Anderson testified (p. 51):

“ Q. Did you see any rockets fired by the Fulton?

“ A. Not to my knowledge. I never saw any
“ rockets fired there.

“ Q. If there had been any rockets fired you would
“ you have seen them?

“ A. Oh, I would be bound to see them.

“ Q. You were awake that night, were you?

“ A. Yes, sir.

“ Q. And you would have seen the rockets if there
“ had been any fired?

“ A. Yes, sir, I would have seen them all right. I
“ could not help but see them.”

The mate of the Berwick testified that there were no rockets fired or discharged (p. 58, 59).

We think the evidence conclusively shows that no rockets were fired and no blue lights were burned.

The Court should not have fixed the value of the Berwick in excess of the sum of \$2,000. Mr. Hume testified (p. 60) that the vessel, if put up at private sale, might bring \$2,000. That at auction she would bring anywhere from \$500 to \$1,000. That she was from ten to twelve years old, of 95 tons burden.

We respectfully submit that the libel should be dismissed, and the appellant awarded his costs, in this, and in the trial Court.

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DOLPH, MALLORY, SIMON & GEARIN,
Proctors for Appellant.

